No. 87-1758

In the Supreme Court of the United States

OCTOBER TERM, 1987

MEYERS INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the Board had the discretion, but was not required, to adopt the definition of the term "concerted activities" that it adopted in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 45a-62a) is reported at 835 F.2d 1481. An earlier opinion of the court of appeals (Pet. Supp. App. 67-179) is reported at 755 F.2d 941 (1985). The supplemental decision and order of the National Labor Relations Board (Pet. App. 1a-44a) is reported at 281 N.L.R.B. No. 118. An earlier decision and order of the Board (Pet. Supp. App. 1-66) is reported at 268 N.L.R.B. 493.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1987. The petition for a writ of certiorari was filed on March 30, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a Michigan company engaged in the manufacture, sale, and distribution of aluminum boats and related products. In April 1979, petitioner hired Kenneth Prill as a driver and assigned him to drive a particular truck and accompanying trailer and to deliver boats from petitioner's Michigan facility to dealers throughout the country (Pet. Supp. App. 72-73). On a number of occasions, Prill complained to his superiors about the operation of the trailer's brakes (*id.* at 27, 73).

In early June, Ben Gove, another driver, was assigned to drive Prill's truck and trailer for two weeks. On one trip, Gove experienced steering problems that nearly caused an accident. On his return, Gove told his supervisor, in Prill's presence, that he would not drive the truck again until it was repaired. Pet. Supp. App. 27-28, 75-76.

On a subsequent trip to Ohio, the brakes on Prill's trailer malfunctioned. Prill stopped at a state roadside inspection station, where the trailer was cited for several defects, some relating to the brakes. Prill submitted the citation to petitioner's officials. Pet. Supp. App. 28.

In July 1979, while driving through Tennessee, Prill had an accident caused by the failing brakes. That evening, Prill contacted petitioner's president, Alan Beatty, who instructed him to get the truck and trailer home as best he could. The following morning, however, Prill decided to call the Tennessee Public Service Commission to arrange for an official inspection of the equipment. As a result of the inspection, a citation was issued and the unit was ordered out of service due to bad trailer brakes and a damaged truck hitch. The citation referred to several Department of Transportation regulations, including one which prohibits the unsafe operation of a vehicle. After petitioner's mechanic learned of the citation, he decided to sell the trailer for

scrap, and Prill drove the truck back to Michigan. Pet. Supp. App. 28-30.

When Prill returned to work on July 5 and turned in the paperwork on his trip, he was summoned to the office of petitioner's vice president, Wayne Seagraves, and questioned about the accident and the damage to the truck. When asked why he had not towed the trailer back as directed, Prill explained that he had thought that it would be unsafe to do so. Seagraves then discharged Prill, stating, "we can't have you calling the cops like this all the time." Pet. Supp. App. 30-31.

2. Prill filed an unfair labor practice charge with the National Labor Relations Board, and a complaint issued alleging that Prill had been unlawfully discharged for engaging in protected concerted activities. The administrative law judge found that Prill had been discharged because of his refusal to drive an unsafe vehicle and because of his safety complaints to the state authorities. Those activities, the ALJ concluded, constituted "concerted activity" within the meaning of Section 7 of the National Labor Relations Act, 29 U.S.C. 157. In reaching that conclusion, the ALJ relied on the Board's decision in *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975), which established, as the ALJ put it (Pet. Supp. App. 31), "a presumption that an individual employee engages in concerted activity where his conduct arises out of the employment relationship and is a matter of common concern among all employees." The ALJ accordingly found that petitioner had violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by discharging Prill. Pet. Supp. App. 31-33.

The Board reversed by a divided vote (Pet. Supp. App. 1-66). The Board first held (*id.* at 5-26) that the *Alleluia* decision articulated an erroneous definition of "concerted activity." The Board explained (*id.* at 15-18) that under the rule in *Alleluia* a single employee, acting entirely alone, may be found to engage in "concerted activity" whenever he in-

vokes statutory rights that "manifest the apparent national will" and therefore reflect " 'consent and concert of action' " (*id.* at 16-17). Reviewing the language of Section 7 (Pet. Supp. App. 5-8) and prior decisions of the Board and the courts (*id.* at 8-15), however, the Board concluded that the *Alleluia* standard was too broad. The Board held (*id.* at 7) that Section 7 "envisions 'concerted' action in terms of collective activity: the formation of or assistance to a group, or action * * * on behalf of a group." Noting that the courts of appeals had rejected the *Alleluia* standard (Pet. Supp. App. 20), the Board concluded that *Alleluia* "does not comport with the principles inherent in Section 7 of the Act" (*id.* at 23-24), and it therefore overruled the case and the Board decisions that had followed it.

In place of the *Alleluia* rule, the Board adopted a definition of "concerted activity" that requires that the employee's actions "be engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself" (Pet. Supp. App. 24 (footnote omitted)).[1] Applying that standard, the Board found that, in refusing to drive the truck and trailer and in contacting state authorities, Prill had acted alone and solely on his own behalf. It concluded that "without the artificial presumption *Alleluia* created, the facts * * * do not support a finding that Prill engaged in concerted activity" (*id.* at 34). The Board therefore dismissed the complaint (*id.* at 34, 39).[2]

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[1] The Board emphasized, however, that its definition "is by no means exhaustive", and it acknowledged the "myriad of factual situations that have arisen, and will continue to arise, in this area of the law" (Pet. Supp. App. 24).

[2] Member Zimmerman dissented (Pet. Supp. App. 39-66). In his view (*id.* at 54), "the assertion of a work-related statutory right falls within the meaning of 'concerted activity.' " Applying that standard, the dissent would have found that petitioner violated Section 8(a)(1) of the Act when it discharged Prill. "By reporting to the Tennessee Com-

3. The court of appeals remanded the case by a divided vote (Pet. Supp. App. 67-179). Relying on *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), the court explained that the validity of an agency regulation must be judged "solely on 'the grounds upon which the [agency] itself based its action' " (Pet. Supp. App. 94 (citation omitted)). In the present case, the court concluded (*id.* at 96), the Board had based its decision on two faulty premises – first, by "assuming that the NLRA *mandates* its present interpretation of 'concerted activities' "; and second, by mistakenly supposing that its decision represents "merely a return to 'the standard on which the Board and courts relied before *Alleluia*' " (*ibid.* (footnote omitted)). The court stated that the Board's definition of "concerted activities" – under which, as the court understood it, there cannot be concerted activity unless "two or more employees join in or authorize conduct" (*id.* at 97) – was not statutorily compelled (*id.* at 105-106). Rather, the court explained that this Court's decision in *NLRB* v. *City Disposal Systems, Inc.*, 465 U.S. 822 (1984), "makes unmistakably clear that, contrary to the Board's view * * *, neither the language nor the history of section 7 requires that the term 'concerted activities' be interpreted to protect only the most narrowly defined forms of common action by employees, and that the Board has substantial responsibility to determine the scope of protection in order to promote the purposes of the NLRA" (Pet. Supp. App. 114). The court also found that the Board's definition "appears to be narrower in at least two important respects" than the standards applied prior to *Alleluia*, and it accordingly rejected the Board's explanation that it was simply returning

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mission, Prill invoked laws regulating motor carriers, and initiated an investigation which resulted in issuance of a citation by the Tennessee Commission based on Department of Transportation regulations" (Pet. Supp. App. 62-63).

to those earlier standards in adopting the new definition of "concerted activities" (*id.* at 121, 129-130).[3] Expressing no opinion as to the "correct test of 'concerted activities' " (*id.* at 71), or "whether under § 7, the Board [could] adopt the [same] test as an exercise of discretion" (*id.* at 96 n.46), the court remanded the case to permit the Board to reconsider its decision in light of the *City Disposal* case and to "exercise the full measure of administrative discretion * * * free from its erroneous conception of the bounds of the law" (*id.* at 71).[4]

4. On remand, the Board accepted, as the law of the case, the court of appeals' judgment that the Board's new definition of "concerted activities" was not required by the Act (Pet. App. 5a). But after "reconsider[ing] th[e] case in light of the court's opinion," the Board determined that its new definition represented "a reasonable construction of

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[3] In the court's view, the Board departed from traditional standards by failing to cover within its new definition two categories of activity: "an individual who brings a group complaint to the attention of management * * * even though he was not designated or authorized to be a spokesman by the group" (Pet. Supp. App. 121-122 (footnote omitted)); and an "individual effort[ ] to enlist other employees in support of common goals" (*id.* at 122 (footnote omitted)).

[4] Judge Bork dissented (Pet. Supp. App. 136-179). In his view, "the Board's reading of section 7 [was] * * * altogether reasonable, and neither *City Disposal* nor any other Supreme Court decision suggests otherwise" (*id.* at 143-144). Disagreeing with the majority, Judge Bork also explained that the Board "did not say that the Act requires the exact formulation it tentatively adopted" (*id.* at 157); it simply held that "section 7 does not authorize the Board to find concerted activity merely because one individual's activity concerns matters that affect the well-being of other employees" (*id.* at 157-158). In addition, Judge Bork concluded that on the facts of this case "there is * * * no definition the Board could propose that would, consistently with the language of section 7, afford [Prill] relief" (*id.* at 159). Finally, Judge Bork disputed the proposition that the Board had adopted a narrower standard than had prevailed prior to the *Alleluia* decision (*id.* at 161-176).

Section 7," which, in the "exercise[] [of its] discretion," the Board "chose[ ] * * * over other possible permissible standards" (*id.* at 6a). The Board explained "that it is protection for joint employee action that lies at the heart of the Act" (*id.* at 12a (footnote omitted)), and that it is therefore "entirely appropriate * * * to take that focus on joint employee action as the touchstone for our analysis of what kinds of activities we must find within the scope of Section 7 in order to effectuate the purposes of the Act" (*id.* at 14a). Its new definition, the Board concluded, "proceeds logically from such an analysis insofar as it requires some linkage to group action in order for conduct to be deemed 'concerted' within the meaning of Section 7" (*ibid.*).[5] Moreover, the Board stated (*id.* at 14a-22a), the definition it had adopted was consistent with the Court's decision in *City Disposal*. Applying its standard to the facts of the case, the Board reaffirmed its prior ruling that Prill had "acted alone and did not engage in concerted activities within the meaning of Section 7" (*id.* at 43a-44a). The Board again dismissed his complaint (*id.* at 44a).

5. On Prill's appeal, the court of appeals affirmed (Pet. App. 45a-62a). The court explained (*id.* at 53a) that the Board "now recogniz[es] that the statute c[an] be read to

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[5] Responding to the court of appeals' concern that its new standard was narrower than the pre-*Alleluia* standard, the Board emphasized that its definition does not mean that "conduct engaged in by a single employee at one point in time can *never* constitute concerted activity within the meaning of Section 7" (Pet. App. 23a (emphasis in original)). Rather, the Board explained, individual action must have "some linkage to group action" (*id.* at 14a) and cannot constitute concerted activity simply because it may inure to the benefit of fellow workers. The Board also stated that its definition of concerted activities does not exclude cases in which "an individual, not a designated spokesman, brought a group complaint to the attention of management" (*id.* at 27a); or in which an individual sought " 'to induce group action' " (*id.* at 32a (footnote omitted)).

support either the *Alleluia* or *Meyers* interpretation of concerted activity" and has concluded that its present definition "is the better interpretation, drawing both upon its reading of the statute and its expertise in administering the statute." The court concluded that "[b]y requiring that workers actually band together, the NLRB has adopted a reasonable—but by no means the only reasonable—interpretation of Section 7" (*id.* at 57a). The court also found that the Board's definition was consistent with *City Disposal,* noting that that case had "neither required nor precluded treating workplace-related statutory rights as establishing, without more, the necessary bond among workers" (Pet. App. 59a-60a). Finding substantial support in the record for the Board's finding that Prill had acted alone and solely on his own behalf, the court affirmed the decision dismissing Prill's complaint (*id.* at 60a-62a).[6]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Moreover, petitioner, which was not a party to the appeal below, does not actually challenge the judgment of the court of appeals (in which petitioner fully prevailed) but contends only that the Board was obligated, and not merely free, to adopt the definition that it selected. Further review is unwarranted.

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, guarantees to employees the "right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining

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[6] Petitioner, which had not participated in the appeal from the Board's supplemental order, applied for and was granted leave to intervene, solely for the purpose of seeking further review (Pet. 12).

or other mutual aid or protection * * *." The Board, affirmed by the court of appeals, concluded that this statutory language requires that activities be "concerted" before they may be protected by Section 7, and that, in general, an activity is "concerted" only where it is " 'engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself' " (Pet. App. 23a (footnote omitted)). Applying that definition, the Board, affirmed on this point as well by the court of appeals, found that since Prill had acted alone and solely on his own behalf, and was not seeking to enforce a collective bargaining agreement, his activities were not "concerted" within the meaning of Section 7.

Petitioner does not challenge the Board's determination that it did not violate Prill's Section 7 rights. Instead, relying on this Court's decision in *City Disposal,* petitioner contends (Pet. 13, 15, 19-22) that Section 7 *mandates* the definition of "concerted activities" adopted by the Board and that the court of appeals erred in holding that the Board might, in its discretion, have adopted a different definition. Having no quarrel with the judgment below, however, petitioner may not complain to this Court about the reasons given by the court of appeals for ruling in petitioner's favor. See *California* v. *Rooney,* No. 85-1835 (June 23, 1987), slip op. 3 (per curiam).

In any event, *City Disposal* did not require the Board to adopt the particular definition of "concerted activities" it selected. Indeed, the Court made quite clear in that case "that the task of defining the scope of § 7 'is for the Board to perform in the first instance as it considers the wide variety of cases that come before it' " and that "on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference" (465 U.S. at 829 (citations omitted)). Finally, petitioner's complaint (Pet. 23-27) that the court of appeals' decision

may provoke new and different but equally "reasonable" definitions of "concerted activities" in the future warrants no review by this Court. Petitioner points to no evidence that the Board in fact contemplates any future changes in its definition. And should the Board seek to change the definition in the future, it will still have to tie its proffered standard to the statutory language and purpose (as it did in this case). Petitioner's speculations about future definitions do not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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